



COMMONWEALTH OF PENNSYLVANIA
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January 19, 2024

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Via ECF

The Honorable Jeffrey L. Schmehl
United States District Court, E.D. PA
201 Penn Street, Suite 518
Reading, PA 19601

Re: *Gardner v. Kutztown University, et al.*, C.A. No. 22-1034

Dear Judge Schmehl:

On behalf of Defendant Kutztown University (KU), I write to respond to Ms. McKinley's letter to Your Honor filed last night at ECF No. 74. That letter does not fully reflect the background of the situation Plaintiff's counsel seeks to discuss on Monday's call.

As this Court is aware, since the start of the pandemic (up to and including the Fall 2023 semester), Plaintiff has steadily informed KU that, pursuant to the orders of her ophthalmologist, Dr. Shah, she cannot safely teach in person. In advance of the Spring 2023 semester, KU proposed a specialized classroom for Plaintiff (and other professors). (See ECF No. 34-41; ECF No. 62, Statement of Additional Facts in support of Defs' MSJ, ¶¶ 56-62). During those discussions, in the hope this would ultimately be acceptable, KU took steps to keep classes available for Plaintiff to teach. Dr. Shah ultimately claimed the specialized classroom was not safe enough for Plaintiff to provide in person instruction. ECF No. 41. Now, after a recent surge in Covid and well after the University-wide deadline for course selection, Plaintiff suddenly seeks to occupy that very same classroom.

Plaintiff's letter filed yesterday does not mention (let alone attach) KU's November 28, 2023 email to Plaintiff seeking information about the prospects of her ability to return for the **Fall** 2024 semester, requesting a response by December 11, 2023. It also does not mention or attach the response she did provide on December 11, 2023, which was the forwarding of an e-mail her counsel wrote to KU's counsel that stated it was inappropriate for KU to ask Plaintiff about the Fall 2024 semester and noted that Covid is once again on an upward trajectory and that they would be willing to discuss Fall 2024 at a later date. These communications are attached hereto at pages 1-3.

The next communication to KU came in the late afternoon of January 9, 2024, when Plaintiff emailed her Dean declaring that was now able to teach in person in the Spring 2024 semester (*see* attached at page 4), which begins **January 22, 2024** – with some classes beginning before our upcoming call with Your Honor. *See* www.kutztown.edu/academics/academic-calendar.html. Obviously, this was completely unexpected news.

As Plaintiff knows, through both her years of employment at KU and this litigation, there is a great deal of advanced planning for each semester, with determinations of classes offered and teachers assigned made months in advance. As of January 9, any classes that Plaintiff is qualified to teach were already assigned to other professors. Had KU been provided with the slightest hint of the possibility of Plaintiff's return for the Spring 2024 semester (which starts Monday, January 22), a contingency plan could have been developed. But there was none here. Instead, Plaintiff's last communication noted Covid was spiking and her uncertainty about being able teach in person in the **Fall 2024** semester.

We are happy to discuss this further on Monday, but we wanted the Court to have a more complete picture beforehand.

Respectfully Yours,

A handwritten signature in blue ink, appearing to read "Kevin Bradford", written in a cursive style.

Kevin Bradford
Senior Deputy Attorney General

Enclosure

cc: All counsel of record

From: Gardner, Carolyn <gardner@kutztown.edu>
Sent: Monday, December 11, 2023 2:46 PM
To: Weidman, Jennifer <weidman@kutztown.edu>
Subject: Re: ADA Accommodation

Jennifer,

Below is a copy of what my attorney sent to the KU attorneys on Friday.

Carolyn

From: Lorrie McKinley
Sent: Friday, December 08, 2023 5:56 PM
To: Kevin Bradford <kbradford@attorneygeneral.gov>
Cc: Skolnik, Matthew R. <mskolnik@attorneygeneral.gov>; Ralph Lamar <ralphlamar@ymail.com>
Subject: Gardner/KU -- Response to Weidman E-mail

Good evening, Kevin-

I hope you are doing well. I am writing in response to the 11/28 communication from Jennifer Weidman advising Dr. Gardner that KU is “revisiting” her request for an ADA accommodation for Fall, 2024 for purposes of “planning,” and reiterating essentially the same “alternative accommodation” she proposed last year. The Fall, 2024 semester is still 10 months away, so at this point there has been no accommodation request. Given the procedural posture of the case in which Ms. Weidman is herself a defendant, and especially in light of KU’s pending request for a hearing on the PI extension, it is inappropriate for Ms. Weidman to be communicating directly with Dr. Gardner about this. Unless something has changed that we are unaware of, HR has no role in academic planning, and she has clearly indicated that the proposed “alternative accommodation” is the only one KU ever plans to offer, regardless of what Dr. Gardner’s circumstances might be. On a more practical level, it is impossible for anyone to predict right now, in December, 2023, whether the proposed alternative accommodation would be sufficiently effective to allow Dr. Gardner to return to work on campus in September, 2024. Certainly, and sincerely, we all hope so, but Covid is once again on an upward trajectory, so it is far too early to tell. Dr. Gardner will be discussing the proposal with her doctor during the next few months, and hopefully by then some of the current questions about the status of the virus can be answered more clearly and in plenty of time for the Department to plan around whatever accommodation needs she might have for Fall 2024. The point remains that there needs to be flexibility to meet whatever those needs might be, even if they exceed what can be effectively addressed by the proposed “alternative accommodation.”

I am going to have Dr. Gardner provide a copy of this communication to Ms. Weidman by December 11th, which is when she asked for a response. If you would prefer to convey it to her yourself, please let me know.

Lorrie

Lorrie McKinley

Lorrie McKinley, Esquire

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On Leave—Spring 2023

From: Weidman, Jennifer <weidman@kutztown.edu>
Sent: Tuesday, November 28, 2023 7:10 PM
To: Gardner, Carolyn <gardner@kutztown.edu>
Subject: ADA Accommodation

Hello Carolyn,

We are planning for Fall 2024 and again revisiting your request for ADA accommodation. We are offering the following accommodation as an alternative to the one you requested:

We will convert the computer lab behind Old Main to a computer classroom. This is a standalone room with its own exterior entrance and restroom facility. During the day, access to the room would be limited to those students and faculty with classes scheduled in that room. The only classes to be scheduled in this room would be for those faculty needing this type of accommodation. The room would remain open to any student or faculty in the evenings. We are providing disinfecting wipes in the classroom for use by anyone who may wish to do so. This should provide a larger computer-equipped space with additional ventilation and air exchange and reduced foot traffic.

The classroom in question is on the first floor in a standalone building behind Old Main, with a ground-level exterior entrance. There is a parking area directly behind the building. The room is 11,212.72 cubic feet (1401.59 s.f. x 8' high ceiling) and holds 48 seats. In order to provide greater social distancing, enrollment would be capped at 35 students. We would eliminate the first row of seats to install ADA-compliant presenter podium, which will be enclosed on three sides with a plexiglass shield. In addition, the first row of seats would be left empty. The current computers in the room are all-in-one units on the desktops but students seated will be able to see each other and the speaker at the front of the room. All necessary computer and A/V equipment (screen, whiteboard, projector, etc.) would be installed to make the classroom conducive to learning. Two portable Carrier Air Scrubbers with HEPA filters and MERV 13 filters will be placed in the room to increase ventilation and air exchange. The goal is to have a minimum of 6 air changes per hour. One air scrubber in that room can't meet the demand, so we would place two units. We also have a bi-polar ionization unit on the heat pump supplying this space and increased MERV filtration.

Please advise if you accept or reject this alternative accommodation for the fall 2024 semester.

Regards,
Jennifer

Jennifer Weidman | Director of Human Resources
Kutztown University of Pennsylvania
HR Center | P.O. Box 730 | Kutztown, PA 19530
Phone: 610-683-1353 | Fax: 610-683-4641 | www.kutztown.edu

From: Gardner, Carolyn <gardner@kutztown.edu>
Sent: Tuesday, January 9, 2024 4:08 PM
To: Chao, Gary <chao@kutztown.edu>
Subject: Happy New Year and some good news

Hello Gary!

Happy New Year!

I just received some good news: I am able to return to work this semester with the accommodations KU has offered me.

My attorneys are in the process of notifying KU's legal counsel and will notify HR. I should have more details soon.

Best regards,
Carolyn